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3
4 UNITED STATES DISTRICT COURT

5 DISTRICT OF NEVADA

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7 JERALD L. KENDRICK,)
8 Plaintiff,)
9 v.) 2:06-CV-00395-PMP-RJJ
10 MICHAEL BRUNET, TINA BRUNET,) OR D E R
11 BRUNET ENTERPRISES, INC.,)
12 Defendants.)

)

13 Presently before the Court is Defendants' Motion to Dismiss or in the Alternative
14 Motion for a More Definite Statement (Doc. #5) filed on July 20, 2006. On August 3, 2006,
15 Plaintiff filed a Response to Defendants' Motion to Dismiss (Doc. #6). Defendants filed a
16 Reply on August 11, 2006 (Doc. #7). On August 17, 2006, Plaintiff filed a Response to
17 Defendants' Reply (Doc. #9).

18 **I. BACKGROUND**

19 According to the Complaint, Plaintiff Jerald L. Kendrick ("Kendrick") is a 71-
20 year-old former employee of Defendants. (Compl. [Doc. ##1, 13] at 1.) Plaintiff worked
21 for Defendants from September 2004 until March 2006. (*Id.* at 2.) Plaintiff alleges in his
22 first cause of action that Defendants violated Title VII of the United States Civil Rights Act
23 by "willfully, maliciously, knowingly, and with pecuniary motive and intent, defraud[ing]
24 Plaintiff of his statutorily imposed earnings" in an effort to unjustly enrich themselves
25 because "Plaintiff was the oldest employee and needful." (*Id.*) With respect to his second
26 cause of action, Plaintiff alleges Defendants unlawfully deprived the Internal Revenue

1 Service and Social Security Administration of monies due them in violation of the United
2 States Tax Code and chapters 86 and 600 of the Nevada Revised Statutes. (Id.)

3 Plaintiff's third cause of action claims Defendant Michael Brunet intentionally
4 sought to defraud Plaintiff and the State of Nevada's Employment Security Division by
5 "suborning perjury through his seeking to persuade his present and past employees, under
6 coercion of job loss and threat of pay loss, to lie about factual matters of which such
7 employees and former employee know the true nature." (Id. at 2-3.) Finally, Plaintiff's
8 fourth cause of action avers Defendant Michael Brunet mistreated Plaintiff in violation of
9 Nevada's elderly abuse statutes and federal labor laws. (Id. at 3.)

10 Defendants move to dismiss the Complaint under Federal Rules of Civil
11 Procedure 8(a) and 9(b) because Plaintiff's Complaint fails to provide a statement of the
12 grounds upon which the Court's jurisdiction depends, is "completely devoid of factual
13 allegations" concerning the material elements of its claims, and does not allege fraud with
14 particularity. In addition, Defendants argue the Court should dismiss Plaintiff's Complaint
15 because Plaintiff has failed to exhaust administrative remedies, lacks standing, and fails to
16 state a claim upon which relief can be granted. Plaintiff responds jurisdiction should attach
17 because he has brought his suit under "the umbrella of the U.S. Code of Civil Rights."
18 Plaintiff also contends his Complaint adequately states a claim for relief and he has clearly
19 stated a claim of fraud.

20 **II. LEGAL STANDARD**

21 In considering a motion to dismiss, "all well-pleaded allegations of material fact
22 are taken as true and construed in a light most favorable to the non-moving party." Wyler
23 Summit P'ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation
24 omitted). However, the Court does not necessarily assume the truth of legal conclusions
25 merely because they are cast in the form of factual allegations in the plaintiff's complaint.
26 See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a

1 strong presumption against dismissing an action for failure to state a claim. See Gilligan v.
 2 Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). The issue is not
 3 whether the plaintiff ultimately will prevail, but whether he may offer evidence in support
 4 of his claims. Id. (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). Consequently,
 5 the Court may not grant a motion to dismiss for failure to state a claim “unless it appears
 6 beyond doubt that the plaintiff can prove no set of facts in support of his claim which would
 7 entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Hicks v.
 8 Small, 69 F.3d 967, 969 (9th Cir. 1995).

9 The liberal rules of notice pleading set forth in the Federal Rules of Civil
 10 Procedure do not require a plaintiff to set out in detail the facts supporting his claim. See
 11 Yamaguchi v. United States Dep’t of the Air Force, 109 F.3d 1475, 1481 (9th Cir. 1997)
 12 (quoting Conley v. Gibson, 355 U.S. at 47). All the Rules require is a “short and plain
 13 statement” that adequately gives the defendant “fair notice of what the plaintiff’s claim is
 14 and the grounds upon which it rests.” Id. (citations and internal quotations omitted). A
 15 claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can
 16 grant, even if the complaint asserts the wrong legal theory or asks for improper relief. See
 17 United States v. Howell, 318 F.2d 162, 166 (9th Cir. 1963).

18 In the case of a pro se plaintiff, the Court construes the pleadings liberally. Pena
 19 v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992). Accordingly, “the allegations of a [pro se
 20 litigant’s complaint] ‘however inartfully pleaded’ are held ‘to less stringent standards than
 21 formal pleadings drafted by lawyers’” Eldridge v. Block, 832 F.2d 1132, 1137 (9th
 22 Cir. 1987) (quoting Huges v. Rowe, 449 U.S. 5, 9 (1980)). “Moreover, before dismissing
 23 an action, a court should always be certain that other less drastic alternatives are not
 24 available.” Id. Nevertheless, a liberal reading of a pro se litigant’s complaint does not
 25 mean the Court may supply the necessary elements of the claim that the pro se litigant did
 26 not initially plead. Pena, 976 F.2d at 471. Furthermore, pro se status does not excuse a

1 litigant from complying with the court's procedural or substantive rules. See United States
 2 v. Flewitt, 874 F.2d 669, 675 (9th Cir. 1989).

3 **III. DISCUSSION**

4 **A. Count One: Title VII/Age Discrimination Employment Act ("ADEA")**

5 Count one of Plaintiff's Complaint alleges a "violation of TITLE 7, UNITED
 6 STATES CIVIL RIGHTS ACT, as rendered judgment in ADEA SMITH V. CITY OF
 7 JACKSON . . ." (Compl. at 2.) Defendants argue this Court should dismiss count one of
 8 Plaintiff's Complaint because Plaintiff has failed to exhaust administrative remedies as a
 9 jurisdictional prerequisite to filing suit in this Court. Specifically, Defendants argue
 10 Plaintiff has failed to file a charge of discrimination with the Equal Employment
 11 Opportunity Commission ("EEOC") before bringing suit in this Court. Plaintiff does not
 12 respond to this argument.

13 Prior to bringing a Title VII or ADEA suit in federal district court, the plaintiff
 14 must exhaust his administrative remedies. Greenlaw v. Garrett, 59 F.3d 994, 997 (9th Cir.
 15 1995) (Title VII); Albano v. Schering-Plough Corp., 912 F.2d 384, 386 (9th Cir. 1990)
 16 (ADEA). A plaintiff must pursue the administrative claim with diligence and in good faith.
 17 Id. (citing Vinieratos v. United States Air Force, 939 F.2d 762, 771 (9th Cir. 1991)). "A
 18 plaintiff may not cut short the administrative process prior to its final disposition, for upon
 19 abandonment a claimant fails to exhaust administrative relief and may not thereafter seek
 20 redress from the courts." Id. (citing Purtill v. Harris, 658 F.2d 134, 138 (3rd Cir. 1981)). A
 21 plaintiff's failure to raise a Title VII or ADEA claim before the EEOC deprives the district
 22 court of subject matter jurisdiction. Lowe v. City of Monrovia, 775 F.2d 998, 1003 (9th
 23 Cir. 1985); 29 U.S.C. § 626(d) (1988).

24 In addition to fulfilling these jurisdictional prerequisites, a plaintiff alleging fraud
 25 is required under Federal Rule of Civil Procedure 9(b) to state with particularity the
 26 circumstances constituting fraud in the complaint. To satisfy this burden, the complaint

“must set forth more than the neutral facts necessary to identify the transaction.”” Yourish v. Cal. Amplifier, 191 F.3d 983, 993 (9th Cir. 1999) (footnote omitted) (quoting In re GlenFed Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc)). The Ninth Circuit has defined “neutral facts” to mean the ““time, place, and content of an alleged misrepresentation.”” Id. at 993 n.10 (quoting GlenFed, 42 F.3d at 1547-48). “[M]ere conclusory allegations of fraud are insufficient.” Moore v. Kayport Package Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989). Moreover, the plaintiff’s complaint must explain what is false about a statement and why it is false. Id. However, a plaintiff may aver generally intent, malice, knowledge, and other conditions of mind. Fed. R. Civ. P. 9(b).

Plaintiff’s Complaint does not allege that he has filed a charge of discrimination with the EEOC under Title VII or the ADEA. Because such a filing is a prerequisite to bringing suit in federal district court, the Court must dismiss count one of Plaintiff’s Complaint for lack of subject matter jurisdiction. Furthermore, Plaintiff has failed to allege fraud with particularity. Plaintiff’s Complaint states that Defendants defrauded Plaintiff of his earnings to unjustly enrich themselves but does not specify the time, place, and content of the alleged misrepresentation or explain what is false about Defendants’ alleged statements and why they are false. However, the Court will grant Plaintiff leave to amend his Complaint to demonstrate he has satisfied the necessary prerequisites to filing an action under Title VII or the ADEA and to allege with particularity the facts and circumstances constituting the alleged fraud.

B. Count Two: Tax Fraud & Social Security Fraud

Count two of Plaintiff’s Complaint claims that Defendants “did willfully, maliciously, unlawfully, and with intent to defraud, deprive the United States Government Revenue Service, and the Social Security Administration, of monies due them, under all applicable statutes of the United States Tax Code, all in violation of laws” (Compl. at 2.) Defendants argue Plaintiff lacks standing to assert count two because Plaintiff has

1 failed to allege Defendants “invaded a legally protected interest of Plaintiff.” (Mot. to
 2 Dismiss or in the Alternative Mot. for a More Definite Statement [“Mot. to Dismiss”] at 7.)
 3 Plaintiff responds that “[t]he CLAIMS ACT OF 1893” allows private citizens to initiate
 4 suits “in cases where fraud against governmental agencies has caused loss of obligations
 5 thereto” (Pl.’s Resp. to Defs.’ Mot. to Dismiss at 4.)

6 A plaintiff seeking to invoke a federal district court’s jurisdiction must establish
 7 he has standing to sue before the court may consider the merits of his claims. Whitmore v.
 8 Arkansas, 495 U.S. 149, 154 (1990). Standing consists of three elements: (1) an injury-in-
 9 fact; (2) a “causal connection between the injury and the conduct complained of;” and (3) a
 10 likelihood that the injury can be redressed by a decision favorable to the party seeking
 11 jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). The party
 12 seeking to invoke federal jurisdiction has the burden of establishing these elements. Id. at
 13 561. When a motion to dismiss is based on lack of standing, the Court accepts as true the
 14 material allegations in the complaint and construes the complaint in the complaining party’s
 15 favor. Warth v. Seldin, 422 U.S. 490, 501 (1975). When the plaintiff lacks standing, the
 16 court has no jurisdiction. Whitemore, 495 U.S. at 155.

17 Plaintiff does not have standing under the three-prong test articulated above.
 18 Plaintiff has not alleged Defendants invaded one of his legally protected interests. Instead,
 19 Plaintiff alleges Defendants invaded the IRS and Social Security Administration’s interests
 20 by depriving them of revenue. Moreover, even if Plaintiff has suffered an injury in fact, he
 21 has not demonstrated a causal connection between the injury and Defendants’ alleged
 22 conduct.

23 However, a liberal reading of Plaintiff’s Complaint indicates Plaintiff may be
 24 attempting to assert a qui tam action under the False Claims Act (“FCA”), 31 U.S.C. §§
 25 3729-33, which provides a plaintiff (also known as “relator”) standing in certain
 26 circumstances. See Ver. Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 778

1 (2000) (stating there is “no room for doubt that a qui tam relator under the FCA has Article
 2 III standing.”). The FCA holds liable those who defraud the government. United States v.
 3 Catholic Healthcare W., 445 F.3d 1147, 1151 (9th Cir. 2006); see also 31 U.S.C. § 3729.
 4 The FCA “encourages the uncovering of such fraud by permitting private persons to bring
 5 qui tam actions on behalf of the government” which, if successful, allow qui tam relators to
 6 “share in any recovery obtained on the government’s behalf.” Catholic Healthcare, 445
 7 F.3d at 1151; see also 31 U.S.C. § 3730(b), 3730(d).

8 Under the FCA, a qui tam relator must bring the action in the name of the
 9 government and must provide the government a copy of the complaint and a written
 10 disclosure of all the material evidence the relator possesses. 31 U.S.C. § 3730(b)(1)-(2).
 11 The relator must also file the complaint with the Court in camera, where it will remain
 12 under seal for at least sixty days. Id. at § 3730(b)(2). A relator cannot serve the defendant
 13 until the court so orders. Id. Before the sixty days have expired, the government must
 14 either take over the action, in which case the government must conduct the suit, or advise
 15 the court that it declines to proceed with the action, in which case the relator has the right to
 16 conduct the suit. Id. at § 3730(b)(3). The FCA, however, “does not apply to claims,
 17 records, or statements made under the Internal Revenue Code.” 31 U.S.C. § 3729(e).

18 In addition to fulfilling the jurisdictional requirements of a qui tam action, a
 19 relator also must satisfy the heightened pleading requirements of Federal Rule of Civil
 20 Procedure 9(b). U.S. ex rel. Lee v. SmithKline Beecham, Inc., 245 F.3d 1048, 1051 (9th
 21 Cir. 2001). As explained above, this means a plaintiff must state the facts and
 22 circumstances constituting fraud with particularity. See Fed. R. Civ. P. 9(b).

23 In this case, even if Plaintiff is attempting to assert a qui tam action, the Court
 24 will dismiss Plaintiff’s claim because the Complaint does not demonstrate he has met the
 25 jurisdictional prerequisites. Plaintiff’s Complaint fails to aver Plaintiff provided the
 26 government with a copy of the complaint and a written disclosure of all the material

1 evidence. Plaintiff did not allege he filed the complaint with the court in camera. Further,
2 Plaintiff has brought this action in his own name, not the government's name as the statute
3 requires. Moreover, to the extent Plaintiff is attempting to assert a qui tam action under the
4 FCA on behalf of the Internal Revenue Service, Plaintiff's action fails because the FCA
5 expressly excludes "claims, records or statements made under the Internal Revenue Code."
6 Additionally, Plaintiff's failure to plead fraud with particularity is a separate ground for
7 dismissal. Accordingly, the Court will dismiss count two of Plaintiff's Complaint with
8 leave to amend to demonstrate he has satisfied the jurisdictional prerequisites to bringing a
9 qui tam action in this Court and to plead fraud with particularity.

10 **C. Count Three: Fraud & Subornation of Perjury**

11 Plaintiff alleges in count three that:

12 DEFENDANT MICHAEL BRUNET, did, personally, willfully,
13 unlawfully, Maliciously, and with personal animus, intentionally seek
to defraud PLAINTIFF, the State of Nevada EMPLOYMENT
14 SECURITY DIVISION, and the regulations promulgated by the
Nevada Secretary of States Office, Corporations Division, by
15 suborning perjury through his seeking to persuade his present and past
employees . . . to lie about factual matters

16 (Compl. at 2-3.) Defendants argue Plaintiff lacks standing to sue for fraud on behalf of the
17 foregoing government authorities and fails to plead with particularity the circumstances and
18 facts constituting fraud. Conversely, Plaintiff argues he has sufficiently stated a claim for
19 fraud.

20 Plaintiff does not plead with particularity the fraud claim in count three.
21 Plaintiff's Complaint neither includes "neutral facts," such as the time, place, and content of
22 Defendant Michael Brunet's alleged misrepresentation, nor facts setting forth what is false
23 about Brunet's alleged statements and why they are false. Consequently, the Court will
24 dismiss count three of Plaintiff's Complaint with leave to amend to allege a sufficient
25 factual basis supporting his fraud claim.

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1 **D. Count Four: Violation of Elderly Abuse Statutes**

2 Count four of Plaintiff's Complaint states that Defendant Michael Brunet "did,
 3 by his actions taken in his employment of Plaintiff Kendrick, impose upon Plaintiff, a series
 4 of acts Contravening the elderly abuse statutes of the state of Nevada and the Federal Labor
 5 laws applicable thereto." (Compl. at 3.) Defendants argue Plaintiff has failed to set forth
 6 sufficient factual allegations to sustain recovery under any actionable legal theory. Plaintiff
 7 does not respond to this argument.

8 Federal Rule of Civil Procedure 8(a) provides that a complaint "shall contain . . .
 9 a short and plain statement of the claim showing that the pleader is entitled to relief . . ." The
 10 Federal Rules "do not require a claimant to set out in detail the facts upon which he
 11 bases his claim. To the contrary, all the rules require is a short and plain statement of the
 12 claim that will give defendant fair notice of what is the plaintiff's claim and the ground
 13 upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1958).

14 Plaintiff's Complaint alleging Defendant Michael Brunet imposed "a series of
 15 acts contravening the elderly abuse statutes" does not give Defendants fair notice of the
 16 grounds upon which Plaintiff's claim rests. Without more, Defendants are forced to
 17 speculate as to which acts Plaintiff is referring and how those acts may have violated the
 18 "elderly abuse statutes." Accordingly, the Court will dismiss count four with leave to
 19 amend for Plaintiff to allege the factual grounds upon which this claim rests.

20 **E. Jurisdiction & Federal Rule of Civil Procedure 8(a)**

21 As an independent basis for dismissal, Defendants contend Plaintiff's Complaint
 22 fails to comply with Federal Rule of Civil Procedure 8(a). Defendants argue Plaintiff's
 23 Complaint fails to provide a statement specifying the grounds upon which the Court's
 24 jurisdiction rests. Plaintiff argues the Court has jurisdiction because the Complaint alleges
 25 a violation of "Title 7, United States Civil Rights Act."

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1 Federal Rule of Civil Procedure 8(a) provides that a complaint “shall contain . . .
 2 a short and plain statement of the grounds upon which the court’s jurisdiction depends. . . .”
 3 However, “[i]f facts giving the court jurisdiction are set forth in the complaint, the
 4 provision conferring jurisdiction need not be specifically pleaded.” Aguirre v. Automotive
 5 Teamsters, 633 F.2d 168, 174 (9th Cir. 1980) (quoting Williams v. United States, 405 F.2d
 6 951, 954 (9th Cir. 1969)); see also Bowers v. Campbell, 505 F.2d 1155, 1157 n.2 (9th Cir.
 7 1974) (stating a plaintiff is “not required specifically to plead the statutory provision
 8 conferring jurisdiction” as long as the plaintiff alleges sufficient facts to state a claim).

9 While Plaintiff’s Complaint refers to various federal laws, each of which could
 10 provide this Court with subject matter jurisdiction, the Complaint neither includes a
 11 statement specifying the grounds upon which this Court’s jurisdiction rests nor pleads
 12 sufficient facts giving the Court jurisdiction under those statutes. Therefore, the Court
 13 advises Plaintiff that in the event he files an amended complaint, he must comply with Rule
 14 8(a).

15 **IV. CONCLUSION**

16 IT IS THEREFORE ORDERED that Plaintiff’s Complaint is hereby dismissed
 17 with leave to amend to (1) show Plaintiff has fulfilled the necessary jurisdictional
 18 prerequisites to bring suit in this Court; (2) plead fraud with particularity; (3) plead
 19 sufficient facts to provide Defendants fair notice of the grounds upon which Plaintiff’s
 20 claims rest; and (4) include a statement specifying the grounds upon which the Court’s
 21 jurisdiction rests or facts giving the Court jurisdiction under the statutes relied upon herein.

22
 23 DATED: December 14, 2006

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PHILIP M. PRO
 Chief United States District Judge